THE HON'BLE MR JUSTICE C.Y.SOMAYAJULU

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WRIT PETITION NO : 3319 of 1996

Dated: 29-08-2005

Between:

Andhra Cements Limited, Secunderabad, rep. by its vice President Mr.K. Balasubramanian.

..Petitioner.

And

The Development Commissioner for Cement Industry and Department of Industrial Development-cum-authority, New Delhi and another.

..Respondents.

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ORDER:

The case of the petitioner, which is a company incorporated under the

provisions of the Companies Act in or about 1940, having its factory at Vijayawada, is that its activity is to manufacture and sell cement, the main raw material for which is limestone and lime kankar obtained from its quarry near Nadikudi, which is at a distance of about 127 Kms through rail and another quarry at Jayanthipuram, which is at a distance of 47 Kms through road. Though its quarries are separated by a distance of 47 Kms cost of transportation of limestone and lime kankar from both the quarries to the factory is almost the same. Before the freight pooling system for transportation of limestone from the quarries to the factory and for transportation of the packed cement from the factory to the consuming centers it was having the freedom to fix the price for its product. Since Union of India (second respondent), in order to maintain uniform sale price of cement all over India, introduced freight pooling system in 1956, through which freight for transportation of cement from the manufacturing unit to the consumption center was standardized, granting subsidy for excess freight incurred only to the factories established subsequent to 1956, that freight pooling system had adversely affected the financial position of the cement industries established prior to 1956 and so the Tariff commission, in its report published in 1974, observed that relief/compensation has to be given to the pre-freight-pooling factories i.e, factories established prior to 1956 on account of the additional freight charges incurred by them, and so, second respondent by the proceedings dated 26-8-1976, directed that an amount of Rs.10/- per ton of cement produced should be reimbursed to the petitioner, subject to the condition that the annual capacity utilization was not less than 90% during that quarter, while granting a higher relief to some other pre-1956 cement factories, so, by its representations dated 28-1-1989, 22-3-1980 and 25-4-1980 it sought higher subsidy to cover the actual cost of transportation of limestone from the quarries to the factory. Since no action was taken on those representations it filed W.P.No.5742 of 1980 in the High court of Calcutta, in which a direction to consider its representation objectively was given vide the order dated 3-7-1987. In spite of that direction, first respondent, by the order dated 5-10-1988, impugned in this petition rejected its claim for higher amount of compensation. Hence, this petition.

2. The Desk Officer of the Department of Industrial Policy and Promotion filed his counter-affidavit, on behalf of the respondents, *inter alia*, disputing the

contention of the petitioner that its company had incurred loss because of the freight pooling system introduced and that its representation was examined in depth by the competent authority and since petitioner did not produce any document to show that it incurred loss due to transportation of limestone and lime kankar from 1976 to 1979 petitioner is not entitled to any relief.

3. A reply affidavit was filed on behalf of petitioner as rejoinder and on behalf of second respondent additional counter affidavit as a rejoinder to the reply affidavit of the petitioner is filed.

4. The main contention of the learned counsel for the petitioner is that since first respondent, in his order impugned, did not consider the actual facts and was under an erroneous impression that the Bureau of Industrial Cost and Prices (for short' BICP') had taken into account the actual cost of transport in 1973-74, ignoring the observation of the Tariff Commission in its report that the Cement Controller, should, in each individual case, decide how much relief, if any, is necessary, the said order of the first respondent is liable to be set aside, more so because first respondent failed to keep in view the direction given by the High Court of Calcutta in its order dated 3-7-1987 in W.P.No.5742 of 1980, and since he did not take into consideration the attested true copies of the audited accounts of the petitioner to establish its contention. He also contend that the fact that W.P.No.1485 of 1989 filed by the petitioner was dismissed by the High Court of Calcutta on 22-9-1995 is not a bar for entertaining this petition because the same was dismissed on the ground of its lacking territorial jurisdiction.

5. The main contention of the learned standing counsel for 2nd respondent is that since the first respondent took into consideration all the relevant material and for passing the order impugned, there are no grounds to interfere with the order impugned.

7. Para 33.8 of the report of the Tariff Commission dated 1-8-1974 reads;

> "In our final cost schedule we have taken into consideration the weighted average of limestone transport costs of all the costed units. This weighted average itself should give the affected factories some relief. We realise, however, that this may not be adequate and some of them may still have some genuine grievance. We suggest that if any such pre-freight-pooling factories feel that their transport

> charges are unduly high on account of the location of their quarries as they existed at the time of the start of the freight pooling system they may approach the Cement Controller, who should, in each individual case, decide how much relief, if any, is necessary and what portion of the excessive transport charges of their limestone is to be reimbursed from the freight pool. As indicated earlier no relief will be admissible to the factories that came into existence after the freight pooling system was introduced". (underlining mine)

and in the summary of final conclusions and recommendations contained in Chapter XIII of its report, in para 47.11, the Tariff Commission observed;

> "We do not consider that any general relief is necessary for transportation of limestone from long distances. However, we have in paragraphs 33.7.5.2, 33.7.5.3, 33.7.5.4 and 33.8 made recommendations concerning the relief, which should be given to some of the units which were set up before the freight pooling system was introduced in 1956".

The fact that the factory of the petitioner was established in 1940 i.e., prior to the introduction of freight pooling system is not denied or disputed.

7. From a reading of the order of the first respondent, impugned in this petition, it is seen that he did not take into consideration any of the contentions raised by the petitioner and seems to have dismissed the claim of the petitioner only on the ground that if any relief is given to the petitioner other effected companies may also make a claim, because in para 16 of his order first respondent observed

> "There is no case of the petitioner for giving escalation for the period from 1-8-1974 to 30-8-1976 as this may invite similar claims from all other cement factories coming in the same category.

The above said observation almost sets at naught the finding of the Tariff Commission that the Cement Controller, should, in each individual case, decide how much relief, if necessary, has to be granted.

7. In the affidavit filed in support of this petition, details of some of the factories

to which subsidy was granted, including that of the petitioner, is given, as

Name of the factory	Distance from the limestone quarry.	Freight incurred per ton based on 1972 cost of transportation	Subsidy granted.
Andhra Cements	127 KM	Rs.12.09	Rs.10.00
Rohtas	70 KM	Rs.7.20	Rs.13.00
Dalmia Dadri	20 KM	Rs.5.67	Rs.6.00
Jaipur Udyog	25 KM	Rs.8.04	Rs.10.00.

The entries in the table are not disputed by the respondents. So it is clear that Jaipur Udyog, whose quarry was at a distance of 25 KMs and which incurred Rs.8-04 ps per ton, towards cost of transportation, was given a subsidy of Rs.10/- per ton, while petitioner whose quarry is at a distance of 127 Kms and which is allegedly to have incurred a cost of Rs.12.09 ps per ton towards transportation charges, was given a subsidy of Rs.10/- only, Rohtas whose quarries are at a distance of 70 KMs and which incurred a freight charge of Rs.7.20 per ton was given Rs.13/- as subsidy. The reasons for such discrimination are not forthcoming, though petitioner gave a table showing the rate of rail freight per ton from quarry Nadikudi to Vijayawada and the rate for trucks per ton from quarry Jayanthipuram to Vijayawada as

PeriodAs on	Rate of rail freight per ton from quarry Nadikudi to Vijayawada.	Rate of contract by trucks per ton from quarry Jayanthipuram to Vijayawada.
01.04.73	Rs.14.30	Rs.13.18
01.04.74	Rs.16.60	Rs.14.25
15.09.74	Rs.19.50	Rs.15.65
01.01.76	Rs.21.60	Rs.16.74
31.03.79	Rs.22.86	Rs.20.16
31.12.79	Rs.24.45	Rs.22.17

8. The fact that BICP took a tentative view regarding the subsidy payable, though the Tariff Commission gave a specific direction that each individual case has to be taken into consideration, seems to have not been kept in view by the first respondent in the order impugned, and he seems to have mechanically adopted the rates fixed by the BICP, though it only is a tentative, but not the final report.

9. As rightly contended by the learned counsel for the petitioner, usually, when fraction of a rupee up to below 50ps would be rounded of to the earlier rupee figure and when fraction of a rupee above 50ps would be rounded of to the next rupee figure, surprisingly, first respondent adopted the tentative policy adopted by the BICP in rounding of the amount to earlier rupee figure inspite of the fact that the same is above 50 ps, obviously without keeping in view the fact that the decision of BICP is only a tentative decision and that final figure has to be fixed by the first respondent. This apart, first respondent also failed to keep in view the directions given by the Calcutta High court in W.P.No.5742 of 1980 dated 3-7-1989 which became final.

9. In the above circumstances, the order impugned is set aside and the case is remitted to the first respondent for passing appropriate orders after taking into consideration the actual cost incurred by the petitioner for transportation of the raw material from the quarries to its factory at Vijayawada during the relevant period, as expeditiously as possible, at any rate within a period of three months from the date of receipt of a copy of this order, after affording an opportunity of being heard to the petitioner. The Writ Petition is disposed of accordingly. No order as to costs.

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29-08-2005

sj